88-1863

No.

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

CRISTOBAL G. CUELLAR PETTY OFFICER
SECOND CLASS (E-5) UNITED STATES NAVY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

ARTHUR R. PHILPOTT
Captain
United States Navy
Judge Advocate General's Corps
Counsel of Record

LOUIS SACCOCCIO
Lieutenant Commander
United State Navy
Judge Advocate General's Corps
Counsel of Record

and

JOHN L. STALEY
Lieutenant
United States Naval Reserve
Judge Advocate General's Corps

NAVY – MARINE CORPS APPELLATE
Review Activity
Washington Navy Yard
Building 111
Washington, D.C. 20374
(202) 433-6380

QUESTION PRESENTED

In a federal criminal trial, does either the double jeopardy clause or the due process clause prohibit the admission into evidence of prior acts of misconduct when the same acts had been the subject of a state court prosecution resulting in an acquittal?

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

CRISTOBAL G. CUELLAR INTELLIGENCE SPECIALIST
SECOND CLASS UNITED STATES NAVY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Cristobal G. Cuellar, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 28, 1988 and March 28, 1989.

OPINIONS BELOW

The amended opinion of the United States Court of Military Appeals, *United States v. Cuellar,* __M.J.__, No. 55405/NA (C.M.A. 28 March 1989), is reprinted as Appendix A. The original opinion of the United States Court of Military Appeals, *United States v. Cuellar,* 27 M.J. 50, No. 55405/NA (C.M.A. 28 September 1988), is reprinted as Appendix B.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Cuellar,* 22 M.J. 529, No. 85-1337, (N.M.C.M.R. 1986), is reprinted as Appendix C.

JURISDICTION

The United States Court of Military Appeals granted the petition for review of this case on March 11, 1987. *United States v. Cuellar,* 24 M.J. 55 (C.M.A. 11 March 1987). The decision of that court, rendered on September 28, 1988, and amended on March 28, 1989, affirmed petitioner's conviction of January 8, 1985, as affirmed by the United States Navy-Marine Corps Court of Military Review on 20 March 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising on the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

10 U.S.C. Sec. 934, Uniform Code of Military Justice.

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of

the offense, and shall be punished at the discretion of that court.

Military Rule of Evidence 404(b).

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Petitioner was tried by a general court-martial composed of officer and enlisted members on December 21, 1984 and January 7 and 8, 1985 for violating Article 134, Uniform Code of Military Justice.[1] Contrary to his pleas, appellant was found guilty of following specification:

> [I]ntelligence Specialist Second Class Cristobal Gonzalez CUELLAR, U.S. Navy, Naval Postgraduate School, Monterey, California, on active duty, did, at 158 California Road, Fort Ord, California, on or about 25 November 1983, commit an indecent act upon the body of Jenny Consuelo HERMOSILLO, a female under 16 years of age, not the wife of the said Cristobal Gonzalez CUELLAR, by fondling her and placing his hand upon her lower stomach and private parts, and by lifting her underpants out away from her body, with intent to gratify the sexual desires of the said Cristobal Gonzalez CUELLAR.

Appellant was sentenced to confinement at hard labor for six years, to be reduced to pay grade E-1, and to be

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[1] 10 U.S.C. Sec. 934 (1982).

discharged from the Naval Service with a bad-conduct discharge. The convening authority approved the sentence as adjudged. The United States Navy-Marine Corps of Military Review affirmed the findings of guilty and the sentence on March 20, 1986. Appendix C. The United States Court of Military Appeals affirmed the findings and sentence in an opinion dated September 28, 1988, which was amended on March 28, 1989. Appendices A and B.

The prosecution's chief witness at trial was the alleged victim of the offense, Jenny Hermosillo. She testified that she, her parents and numerous other relatives were present at a Thanksgiving Day gathering at petitioner's home. By the time she went to bed, most of the adults already were asleep. She went to bed with Marie and Jacob Cuellar, two of petitioner's children. The children all slept in a large bed in one of petitioner's bedrooms, with Jacob in the middle of the bed, and Marie and Jenny on either side.

Shortly after falling asleep, Jenny was awakened by someone rubbing her stomach. At the time, she was wearing a sweater, a blouse, and blue jeans, all of which were buttoned when she went to bed. She was awakened by someone rubbing her stomach. Her pants were unfastened and her blouse and sweater were pulled up to the middle of her chest. Jenny testified that the person rubbing her stomach was petitioner; she knew this because "he is the only one in the house that didn't have any hair on top of his head." Jenny then tried to get out of bed but petitioner pushed her back down and told her that he would leave her alone. When she lay down again, petitioner lifted up her underwear and reached inside. At that point, Jenny hit his arm with her elbow and he fell back. She stated that she had to go to the bathroom. Petitioner told her to go but to come right back, admonishing her not to tell anyone. Jen-

ny then went into the bathroom, came out, and went into her parents' room and told her father what had happened.

Jenny's testimony was inconsistent with her prior statements. On cross-examination, Jenny stated that at no time did petitioner touch her vaginal area, or "private parts." She also admitted that, at a prior proceeding, she had testified that there were four people in the bed, not three, and that she did not remember Jacob being in the bed. Further, she admitted that she previously had testified that she and the others had been sleeping in two beds pushed together rather than in one large bed. Absent admission of the prior acts of misconduct by petitioner, the trier of fact could have reached a finding of not guilty.

Pursuant to Military Rule of Evidence 404(b), which is identical to Federal Rule of Evidence 404(b), the prosecution offered the testimony of four young females who were allegedly victims of prior acts of molestation by appellant. Defense counsel made timely and proper objections, and sought a hearing *in limine*. During that hearing, the defense counsel moved to exclude the testimony of all four females, arguing that their testimony was not admissible under Military Rules of Evidence 404(b) and 403. The defense counsel also moved to exclude the testimony of two of the victims of the prior acts of molestation, Darlene Hermosillo and Rebecca Knoblock, on the additional ground of collateral estoppel. Petitioner had been acquitted previously in Virginia state court in 1982 of the charge involving Rebecca Knoblock. She testified on the merits in that case. Petitioner had also been acquitted in California state court of the charge involving Darlene Hermosillo on a motion for judgement of acquittal due to insufficient evidence.

The military judge overruled Petitioner's objections and allowed the testimony of all four witnesses to be admitted

into evidence. In addition, the military judge ruled that petitioner could not introduce evidence showing that he had been acquitted of the charges arising from the incidents with Darlene Hermosillo and Rebecca Knoblock.

On the second day of trial, the prosecution called Darlene Hermosillo, age 12. She testified that, about four years prior to the trial, she went to the Cuellar home with her family for a few days. One evening she was sleeping in a double bed with Marie Cuellar. She did not know in which room she was sleeping. At an unspecified time in the middle of the night, she was awakened by someone she identified as petitioner, who was in bed with her and was feeling her stomach and vagina. Her reaction to these acts was to begin crying and turn over on her side. She never said anything to petitioner but only whispered Marie's name. Petitioner left the room after she turned over.

The next prosecution witness was Rebecca Knoblock, age 13. She testified that on New Year's Day of 1982 at about 10:00 a.m. she was sleeping with Christy Cuellar, another of petitioner's children. When they woke up, they went downstairs to have breakfast. When Christy was gone, petitioner began to rub Rebecca's entire body with ointment, including her stomach and between her legs. Christy returned but was sent upstairs again by petitioner in order to get some different ointment. The rubbing continued during this time. Rebecca did not protest or attempt to leave the room. A few minutes later petitioner suggested that the two girls go into the living room with him and that Rebecca rub his arm because it was tired. Petitioner lay on the couch and the two girls sat on the floor. Petitioner again asked Rebecca to rub his arm, whereupon she went over to him. In Christy's presence petitioner then asked Rebecca to rub his legs. She began doing so, at which point petitioner grabbed her arm and attempted to put her

hand down his pants. She jerked away and went upstairs where her mother and her mother's boyfriend had been during the entire incident.

The Court of Military Appeals granted review of the following issues (Appendix A at 4a):

1. Whether the trial court erred in allowing four female witnesses to testify that appellant had committed prior uncharged acts of sexual molestation upon them.
2. Whether the military judge erred in admitting evidence of prior uncharged acts of sexual molestation for which acts appellant had previously been tried and acquitted in state courts.
3. Whether after admitting evidence of prior uncharged acts of sexual molestation, the trial court erred in refusing to allow appellant to introduce evidence that he had been tried in state courts and acquitted of charges arising from two of these acts.

The Court of Military Appeals concluded that the trial judge had not erred by allowing the four female witnesses to testify about the prior uncharged acts of sexual molestation, or by admitting such evidence despite petitioner's acquittals by state courts. Appendix A at 10a-12a. The court also held, however, that the trial judge had erred by not admitting evidence that petitioner had been acquitted in state court of the two of the uncharged acts of molestation, but ruled the error was harmless. Petitioner seeks review of the Court of Military Appeal's conclusion that the testimony of Rebecca Knoblock and Darlene Hermosillo was not barred by collateral estoppel.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the double jeopardy clause or the due process clause prohibits the admission into evidence of prior acts of misconduct when the same acts had been the subject of a state court prosecution resulting in an acquittal.[2] Review of this case is appropriate to resolve a conflict among the circuits regarding the scope of collateral estoppel, and to decide whether collateral estoppel applies in federal prosecutions to bar the admission of facts which were previously decided in favor of the accused in a prior state court prosecution.

The majority of federal circuits exclude evidence of prior unrelated criminal misconduct for which the defendant had been previously tried and acquitted on the grounds of collateral estoppel. *United States v. Mespoulede,* 597 F.2d 329, (2nd Cir. 1979); *United States v. Keller,* 624 F.2d 1154 (3rd Cir. 1980); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1979); *Albert v. Montgomery*, 732 F.2d 865 (11th Cir. 1984). Other circuits have held that the prior acquittal does not bar introduction of evidence concerning prior criminal conduct if such evidence would otherwise be admissible under Federal Rule of Evidence 404(b). *United States v. Van Cleave,* 599 F.2d 954 (10th Cir. 1979); *United States v. Rocha*, 553 F.2d 615 (10th Cir. 1977). Courts taking this approach limit collateral estoppel, in practical effect, to barring prosecution when the fact previously decided in favor of the accused is an element of the offense currently charged. Another Circuit approaches the issue on a case-by-case basis focusing on the nature of the issue decided in the first trial and its relation-

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[2] Petitioner is not contesting the admissibility of the prior acts under Military Rule of Evidence 404(b).

ship to the case under consideration. *United States v. Johnson,* 697 F.2d 735 (6th Cir. 1983).

The circuits excluding such evidence have been unable to agree on the basis for their decision, citing either due process concerns, double jeopardy protection, or common law collateral estoppel principles prohibiting the introduction of such evidence. *Compare United States v. Mespoulede,* 597 F.2d 329 (2nd. Cir. 1979), and *Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972), with *United States v. Keller,* 624 F.2d 1154 (3rd. Cir. 1980). The federal cases addressing the issue have done so in the context of an acquittal entered by a federal court followed by a federal prosecution. The Court of Military Appeals decided that collateral estoppel did not bar the admission of the two females' testimony because the acquittals were by state courts and therefore a federal court was not barred from admitting testimony regarding the offenses. Appendix A at 12a. The mere presence of dual sovereigns ought not to be dispositive of this issue in this court or other federal courts.

Collateral estoppel was incorporated into the double jeopardy clause in *Ashe v. Swenson,* 397 U.S. 436 (1970). It is a common law doctrine which held that a party may not relitigate a fact decided adversely against him. The common law doctrine required the parties to be the same in each litigation. This court, however, has removed the requirement of mutuality of parties in the context of civil litigation. *See Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 331 (1979). The doctrine of mutuality has gone through a similar evolution in the criminal area, with several state courts barring criminal prosecutions because of findings of fact made in administrative hearings. *See generally* 30 A.L.R. 4th (doctrine of res judicata or collateral estoppel as barring relitigation in state criminal

proceedings of issues previously decided in administrative proceedings). Similarly, a number of state courts have barred state prosecutions which followed acquittals in federal courts. *See generally* 6 A.L.R. 4th 802 (dual prosecution-federal and state). This Court should consider extending collateral estoppel to bar relitigation in federal prosecutions of facts decided in favor of a defendant in a prior state court prosecution.

The Court of Military Appeals refused to apply collateral estoppel to bar the testimony of the two females because "the hands of one prosecutor should not be bound by the poor results obtained by another prosecutor who derives his authority from a different sovereign." Appendix A at 13a. That reason is not sufficient to reject the application of collateral estoppel. *Parklane Hosiery Co. Inc. v. Shore, supra,* recognized that collateral estoppel should apply when the fact which is being sought to estop was vigorously litigated in the prior proceeding. 439 U.S. at 332.

Ashe v. Swenson, supra, directs the following approach in applying collateral estoppel:

> Where a previous judgement of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

397 U.S. at 444. Under this approach, collateral estoppel applies only when the jury makes, in effect, a specific finding of fact. If a judge, examining a record from a general acquittal, is able to conclude that the jury must have concluded a specific fact in order to render an acquittal, the

litigation must have focused on that specific fact. Collateral estoppel seeks to foreclose relitigation of facts which were the object of vigorous litigation. Hence the goal underlying collateral estoppel is furthered by applying it to facts which the government seeks to establish in a federal prosecution and which were previously determined in a state court prosecution.

Applying collateral estoppel in the above manner preserves judicial resources, and is fair to the defendant. Petitioner had already defended against the charges of molestation made by Rebecca Knoblock and Darlene Hermosillo. He should not be forced to defend against those allegations again.

CONCLUSION

Review of this case is appropriate to resolve a conflict among the circuits with regard to the scope of collateral estoppel; the federal circuits are unable to articulate clearly whether it bars the admission of a fact which was established in a prior litigation, or simply bars prosecution when the fact which was previously decided is an element of the offense currently charged. The federal circuits are also unable to articulate clearly the substantive legal principles underlying collateral estoppel. This Court should also consider whether collateral estoppel applies in federal prosecutions to bar the admission of facts which were previously decided in favor of the accused in a prior state court prosecution.

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 55,405
NMCM 85 1337

UNITED STATES, APPELLEE

v.

CRISTOBAL G. CUELLAR, INTELLIGENCE SPECIALIST SECOND CLASS, U.S. NAVY, APPELLANT

Sept. 28, 1988
As Amended March 28, 1989

Accused, an intelligence specialist second class in the United States Navy, was convicted by general court-martial, Philip F. Roberts, J., of indecent act upon female under 16 years of age, and he appealed. The United States Navy-Marine Corps Court of Military Review, 22 MJ 529, affirmed. Review was granted. The United States Court of Military Appeals, Everett, C.J., held that: (1) extrinsic offense evidence was admissible, and (2) accused should have been allowed to introduce evidence that he had been acquitted when prosecuted for extrinsic acts but error was harmless.

Affirmed.

1. Military Justice No. 1028

Extrinsic evidence of prior similar sexual molestations by accused against young girls under the age of 16 was admissible in general court-martial for commission of indecent act upon a female under 16 years to prove

accused's intent and to corroborate victim's testimony about perpetrator's identity. Military Rules of Evid., Rule 404(b).

2. Military Justice No. 1028

Evidentiary rule governing admission of other crimes evidence does not require that evidence of uncharged misconduct be clear and conclusive to be admissible and does not require judge to make preliminary finding that uncharged misconduct occurred; rather, judge decides whether jury could reasonably find conditional fact by a preponderance of evidence. Military Rules of Evid., Rule 404(b).

3. Military Justice No. 1028

Military judge did not abuse his discretion in finding that probative value of evidence of alleged prior molestations by accused against girls under age 16 outweighed prejudicial effect of that evidence in trial for commission of indecent act upon female under age 16. Military Rules of Evid., Rule 403; UCMJ, Art. 134, 10 U.S.C.A. § 934.

4. Military Justice No. 1035

Acquittal of accused in state courts was not binding in military court; accordingly, evidence of prior uncharged acts of sexual molestation for which accused had previously been tried and acquitted in state courts was admissible in present court-martial for similar offense. Military Rules of Evid., Rule 404(b).

5. Military Justice No. 832

Requirement for collateral estoppel that sovereign must be same in each trial may be eliminated by statute.

6. Military Justice No. 1028, 1425

When Government sought to introduce in general court-martial for commission of indecent act upon female under 16 years extrinsic evidence of prior similar sexual molestations allegedly committed by accused against other young females, accused should have been allowed to introduce evidence that he had been acquitted when prosecuted for two extrinsic acts; however, error was not reversible given that other girls testified to prior sex acts as to which accused had never been acquitted in any court and there was overwhelming evidence of guilt.

For Appellant: *Lieutenant Teresa A. McPalmer,* JAGC, USNR (argued); *Lieutenant Commander James J. Quigley,* JAGC, USN (on brief); *Commander Frederick N. Ottie,* JAGC, USN.

For Appellee: *Major Laura L. Scudder,* USMC (argued); *Captain Wendell A. Kjos, JAGC,* USN (on brief); *Captain Carl H. Horst,* JAGC, USN, *Commander Michael P. Green,* JAGC, USN, *Lieutenant W. A. Durling,* JAGC, USNR.

Opinion of the Court

EVERETT, Chief Judge:

The opinion dated September 28, 1988, 27 MJ 50, is amended by adding a new Part III and a revised Part IV. *Id.* at 54-56.

Cuellar was tried by a general court-martial with members and found guilty of committing an indecent act upon a female under 16 years of age, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. He was sentenced to a dishonorable discharge, confine-

ment for 6 years, and reduction to E-1. The convening authority approved the sentence, and the Court of Military Review affirmed. 22 MJ 529 (1986). This Court granted review to consider these interrelated evidentiary issues:

I

WHETHER THE TRIAL COURT ERRED IN ALLOWING FOUR FEMALE WITNESSES TO TESTIFY THAT APPELLANT HAD COMMITTED PRIOR UNCHARGED ACTS OF SEXUAL MOLESTATION UPON THEM.

II

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE OF PRIOR UNCHARGED ACTS OF SEXUAL MOLESTATION FOR WHICH ACTS APPELLANT HAD PREVIOUSLY BEEN TRIED AND ACQUITTED IN STATE COURTS.

III

WHETHER AFTER ADMITTING EVIDENCE OF PRIOR UNCHARGED ACTS OF SEXUAL MOLESTATION, THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO INTRODUCE EVIDENCE THAT HE HAD BEEN TRIED IN STATE COURTS AND ACQUITTED OF CHARGES ARISING FROM TWO OF THESE ACTS.

I

A

On Thanksgiving Day, 1983, Cuellar hosted a large family gathering at his quarters at Fort Ord, California. His sister-in-law, her husband, and their four children, including their 10-year old daughter Jenny, were present. The guests stayed overnight, and Jenny slept in a bedroom upstairs with Cuellar's little son and daughter. After falling asleep fully dressed, she awoke and found appellant rubbing her stomach. He had pulled her shirt up to the middle of her chest and had unbuttoned and unzippered her pants. Jenny recognized Cuellar because he was the only bald-headed person at the house that night. When she pushed his hand away and attempted to get out of the bed, he told her to lie back down and he would leave her alone. However, after she did so, he lifted her panties away from her body and put his hand near her vagina. He stopped when she hit his arm. On the pretext that she had to use the bathroom, Jenny went to the bathroom and then quickly proceeded to where her parents were sleeping and woke her father.

According to her father, Jenny was nervous and "shaking and I couldn't understand her. She was crying, and I tried to get her to calm down because I couldn't understand her at the moment." He immediately confronted Cuellar, who was standing in the living room, "looking at me real nervous, trying to have me stay quiet." However, Cuellar did not seem surprised by the confrontation and appeared to have been waiting for him to say something

about the incident.[1] The father then asked Cuellar why "he molest[ed]" Jenny,

> and I was yelling and he stood staring at me and putting his fingers towards his mouth and trying to keep me to stay quiet. I just told him, "To hell with it!" Excuse my language. And I tried to get him to tell me why, and he turned around trying to get me to stay quiet, and he just laid on the couch pretending he didn't want to have nothing to do with it. So, I told him, "From this day on, I don't ever want to see you. I don't know you. I'm getting out of here right now. Don't ever say you are related to me."

Jenny's father and his family packed their things, abruptly left Cueller's home around 4:00 a.m., and started driving back to their home in Oceanside.

Cuellar's illicit involvement with Jenny was further confirmed by a third prosecution witness, his brother-in-law, Donald Harper. He testified that he had been drinking with appellant and had asked what had happened at his house on Thanksgiving Day. Harper told Cuellar he had heard that Jenny's parents "were going to press charges for child molestation." Thereupon, appellant exclaimed, "I guess I really screwed up this time." Cuellar asked Harper to talk to Jenny's parents about "drop[ping] the charges if he agreed to seek psychiatric help."

B

Still, trial counsel wished to call to the stand four other young females—Sheryl, Robin, Darlene, and Becky—who

[1] Jenny's father testified that at this time Cuellar was wearing cut-off shorts but that earlier that day he had worn black pants. Jenny had testified that a pair of black pants was by the side of the bed where she had been sleeping and that she had noticed the black pants when she went into the bedroom to get her shoes and socks after the incident occurred.

allegedly had been sexually molested by Cuellar in his home at different times from 1980 to 1982. Darlene was Jenny's sister.

Defense counsel promptly moved *in limine* to prevent them from testifying on the ground that their testimony was inadmissable under Mil.R.Evid. 404(b) and 403, Manual for Courts-Martial, United States, 1984. Furthermore, he contended that, even if the evidence of the prior molestations was generally admissible, the incidents involving Becky and Darlene should be excluded because in 1982 Cuellar had been acquitted in Virginia of criminal charges against him relating to molestation of Becky and in 1984 a California court had granted him a judgment of acquittal by reason of insufficient evidence to prove a charge that Darlene had been molested. Alternatively, the defense contended that, if evidence of these two incidents was received, then, at least, the defense should be allowed to inform the court-members that appellant had been acquitted on each occasion.

Trial counsel argued "that this is a textbook 404(b) case" and asserted that the previous misconduct would prove the intent and identity of appellant and would further corroborate Jenny's testimony. Any danger of unfair prejudice to appellant would be substantially outweighed by "the immeasurable probative value of this evidence." Furthermore, the prosecutor contended that an acquittal did not render inadmissible evidence concerning the alleged misconduct; and he himself later moved *in limine* that the defense "be precluded from using any testimony, remarks, questions or arguments which might inform the court members of said acquittals."

Upon considering the briefs and arguments of counsel, the military judge denied the defense motion *in limine*. He ruled the evidence was admissible under Mil.R.Evid.

404(b) for several reasons: There was a "striking similarity" in the previous acts of molestation that "most strongly" reflected "on the intent of the accused." He concluded that "the evidence might be utilized to destroy any suggestion that the acts complained of were innocent or there was a mistake about the intention or mistake about what took place." Moreover, the previous acts might have constituted "signature-type acts"—conduct which bore the accused's unique imprint. Finally, he felt that the previous incidents involving the young females were admissible under Mil.R.Evid. 404(b) because they tended to establish Jenny's "credibility" and "would tend to offset any suggestion that" her testimony was "youthful fantasy or conjecture or unreasonable apprehension and fear."

The military judge ruled that the evidence had great probative value; that it related to certain elements of the offense; and that the Government's use of the evidence in this case was not unfairly prejudicial to appellant. As to the incidents involving Becky and Darlene, the judge perceived no double jeopardy or collateral estoppel, because "there was not sufficient findings concerning that testimony; and in that case, the parties—there is not a sufficient identity of parties."

The military judge also granted trial counsel's motion *in limine* to prevent the defense from introducing evidence showing that Cuellar had been acquitted of the charges against him in two of the molestation cases. He ruled that any acquittals were not relevant; but he indicated that Jenny could be questioned about her sister Darlene's case in order to show bias.

Sheryl then testified that 4 years before, when she was 10, she had spent New Year's Eve at Cuellar's house. While sleeping in the same bed with his daughters, she awoke to find him with his hand under the covers—under her nightgown—and touching her private parts. She pushed him away and left his house. According to Robin,

several years earlier, when she was 15, she awoke while spending the night at Cuellar's house and found him lying beside her rubbing her "butt" with one hand and her vagina with the other. She left the bed but did not leave his house.

Darlene testified that 4 years before, when she was 8, she had stayed several days at Cuellar's home; and one night she awoke to find her jeans and shirt unbuttoned. He was feeling her stomach and placing his finger inside her vagina. She turned away and whispered to his daughter, Marie Cuellar, with whom she shared the bed. Thereupon, appellant left the room.

Finally, Becky testified that 3 years before, when she was 10, she had spent New Year's Day at Cuellar's house. On that morning she and Christy Cuellar, his other daughter, with whom she was sleeping, were awakened by appellant and offered breakfast. While they were in the kitchen, Cuellar, on the pretext of checking her for mosquito bites, rubbed his hands all over her body—including under her nightgown and between her legs. Christy had been sent to fetch some ointment while this was occurring; and, upon her return, Cuellar sent her back upstairs for a different ointment and again rubbed Becky's body and private parts. Shortly thereafter, while Christy was watching television, Cuellar tried to place Becky's hand inside his pants; but she jerked her hand away, ran upstairs, and reported the incident to her mother and her mother's boyfriend.

II

The first issue to be decided is whether the testimony of any of these young girls was admissible under Mil.R.Evid. 404(b). The Rule provides:

> Evidence of other crimes, wrongs or acts is not permissible to prove the character of a person in order to

> show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We conclude that this evidence qualified for admission under Mil.R.Evid. 404(b). Trial counsel properly attempted to use the previous misconduct to prove Cuellar's intent and to corroborate Jenny's testimony about his identity. Moreover, we agree with the military judge that there were close parallels between the previous acts of molestation committed by Cuellar and the claimed misconduct with Jenny. Each of the sex acts was committed (1) against young girls under the age of 16; (2) while they were visiting Cuellar's home, either by themselves or with other family members; (3) with one exception, during the nighttime; (4) while the minor female was in the presence of one or more children who were either sleeping or unaware of the activity going on; and (5) in each instance Cuellar placed his hand near the private area of the girl's body. Not only does this testimony of the four young witnesses strongly suggest that he intended to molest Jenny sexually, but also it tends to demonstrate a *modus operandi* on Cuellar's part. Under these circumstances, the evidence was admissible under Mil.R.Evid. 404(b). *See United States v. Mann,* 26 MJ 1 (CMA), *cert. denied,* 109 S.Ct. 72 (1988).

Appellate defense counsel also have claimed that the evidence of uncharged misconduct was not "clear and conclusive" and therefore should have been excluded. *See United States v. Janis,* 1 MJ 395, 397 (CMA 1976). Even if this high standard of proof were applicable, the testimony of the four girls would have met that standard. Moreover,

as we interpret Mil.R.Evid. 404(b), it does not require that the evidence of uncharged misconduct be "clear and conclusive," so in this regard *Janis* is superceded. *United States v. Mirandes-Gonazalez,* 26 MJ 411 (CMA 1988); *cf. Huddleston v. United States,* 485 U.S. __, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) (interpreting the comparable Federal Rule of Evidence). Under both the Military Rules and the Federal Rules, the judge is not required to make a preliminary finding that the uncharged misconduct occurred. Instead, he "decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." 108 S.Ct. at 1501.

We also disagree with appellant's argument that the probative value of the previous sex offenses was substantially outweighed by its danger of unfair prejudice to appellant. The decision to admit or reject evidence pursuant to Mil.R.Evid. 403 lies within the military judge's discretion; and unless he has abused his discretion, we will not disturb his ruling. In this case, there was no abuse of discretion in admitting the challenged evidence. *Cf. United States v. Hicks,* 24 MJ 3 (CMA), *cert. denied,* __ U.S. __, 108 S.Ct. 95, 98 L.Ed.2d 55 (1987) (the military judge did not abuse his discretion in admitting the testimony of four females who all testified to appellant's previous, similar acts of extortion for sexual favors).

III

In *United States v. Hicks, supra,* the Court considered whether the military judge had erred in admitting evidence of prior acts of sexual molestation of which the accused had previously been tried and acquitted by a court-martial. Only two judges participated in the decision. However, both judges agreed there that collateral estoppel

did not bar admission of evidence of the prior misconduct, because the accused had failed to establish that, in acquitting him at the earlier trial, the fact-finder had necessarily decided that he was innocent of the prior misconduct as to which the Government offered evidence at the later trial.[2]

In the present case, we observe immediately that a basic prerequisite for applying collateral estoppel is missing. The trial here was by a court-martial, which is established under federal authority. The prior acquittals of Cuellar were in State courts. It is well established that, absent some statute to the contrary,[3] an acquittal in a criminal trial conducted by one sovereign is not binding in a crim-

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[2] Judge Cox' opinion also expressed his view as to some other aspects of collateral estoppel, which it was not necessary for me to reach in my separate opinion. He pointed out that

> the better view [which is the majority rule] is that collateral estoppel does not preclude use of otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted. The questions to be decided are whether the evidence is relevant (Mil.R.Evid. 401) and whether the probative value of the proffered evidence is outweighed by its prejudicial effect (Mil.R.Evid. 403).

United States v. Hicks, 24 MJ 3, 8 (CMA), *cert. denied,* __ U.S. __, 108 S.Ct. 95, 98 L.Ed.2d 55 (1987).

[3] The requirement for collateral estoppel that the sovereign must be the same in each trial may be eliminated by statute, *see e.g., State v. Hogg,* 118 N.H. 262, 385 A.2d 844 (1978). Thus, after the defendant in *United States v. Scott,* 24 MJ 186 (CMA 1987), had succeeded in having his conviction set aside and then at a retrial was acquitted by the court-martial, he could not be tried in a Virginia State court, because under a State statute, prosecution in a federal court bars trial for the same misconduct in a Virginia court. *See* Code of Virginia § 19.2-294. The NATO Status of Forces Agreement also eliminates the authority of dual sovereigns and bars trial in a court-martial after an accused has been tried in a court of the host country or vice-versa. *United States v. Green,* 14 MJ 461 (CMA 1983), and *United States v. Stokes,* 12 MJ 229 (CMA 1982).

inal trial conducted by a different sovereign. *Cf. Heath v. Alabama,* 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985); *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *United States v. Green,* 14 MJ 461 (CMA 1983); and *United States v. Stokes,* 12 MJ 229 (CMA 1982).

One justification for this rule is that, because of the difference in sovereigns, there is no identity of parties, which usually is a prerequisite for collateral estoppel. Another rationale is that the hands of one prosecutor should not be bound by the poor results obtained by another prosecutor who derives his authority from a different sovereign; otherwise the agents of one sovereign, by a negligent prosecution, could defeat the interests of the other sovereign. In any event, we are convinced that, until Congress legislates to the contrary, a court-martial is not collaterally estopped by the outcome of a trial in a state court. Thus, even if Cuellar were acquitted in the state courts because the factfinder there was not convinced of his guilt of the same misconduct as to which the Government sought to offer evidence in his trial by court-martial, this acquittal would not bar the court-martial from receiving the evidence.

IV

The military judge granted trial counsel's motion *in limine* to prevent the defense from introducing evidence or from arguing that Cuellar had been acquitted in state courts of the sexual misconduct about which Becky and Darlene were testifying. In so ruling, the judge was in error.

As already noted, *see* n. 2, *supra,* authority is divided as to whether the prosecution may offer evidence of un-

charged misconduct of which the accused has previously been acquitted. However, in those jurisdictions which allow such evidence to be received, there also is no unanimity of view whether, if evidence of the misconduct is admitted, the defendant may also show that he has been found not guilty thereof.

Appellant has cited 29 Am Jur 2d, Evidence § 332, at 380, which states:

> Most courts following that rule [that evidence of misconduct is admissible notwithstanding a prior acquittal] hold that where proof of another offense has been admitted, the defendant is entitled to prove his acquittal, although there is, in this respect, authority to the contrary.

(Footnotes omitted.)

This source refers to an Annotation in 86 A.L.R.2d 1132 (1962), which states, in § 4, that "[t]he authorities are not in agreement" on this issue but does not purport to state a majority rule. The Later Case Service Supplement (at 416) to this section cites various state court cases which generally hold that it is error to exclude evidence of the acquittal.[4]

The Government—although apparently conceding that the majority rule of the state courts is to allow a defendant to prove that he has been acquitted of other misconduct—contends that the approach of the federal cases is somewhat different; and they cite *United States v. Riley,* 684 F.2d 542 (8th Cir.1982), *cert. denied,* 459 U.S. 1111, 103 S.Ct. 742, 74 L.Ed.2d 962 (1983); *United States v. Kerley,* 643 F.2d 299, 300-01 (5th Cir.1981); and *United States v.*

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[4] This supplement also mentions that the annotation in 86 A.L.R. 2d 1132 (1962) has been superseded by an annotation in 25 A.L.R. 4th 934 (1983).

Viserto, 596 F.2d 531, 536-37 (2d Cir.), *cert. denied,* 444 U.S. 841, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979).

Government appellate counsel insist that "evidence of a prior acquittal is not relevant, because it does not prove innocence, but rather merely indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime" and because the "probative value" of such evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *See United States v. Kerley, supra.* Moreover, "a judgment of acquittal is hearsay"; and, unlike a judgment of conviction, it is not excepted by the rules of evidence from the operation of the hearsay rule. *United States Viserto, supra* at 537.

Although we recognize that these arguments are strong, we conclude that an accused is entitled to prove that he has been acquitted of acts of misconduct received in evidence under Mil.R.Evid. 404(b). As the Supreme Court of Oregon has pointed out:

> [T]he admission of evidence of other offenses in which the defendant has been involved without disclosing that he was acquitted tends to brand him as a 'criminal' and exposes him to the danger that the jury might lose sight of the presumption of innocence and the high level of proof required to rebut it. Contrary to the state's contention in this case, we do not believe that there is a risk of confusion of the jury sufficient to require the defendant to stand mute on the fact of her innocence or guilt of a crime nearly identical to the one charged.

State v. Smith, 271 Or. 294, 532 P.2d 9, 11-12 (1975).

In *Womble v. State,* 8 Md.App. 119, 258 A.2d 786, 789 (1969), which, like this case, involved a sexual offense, the

Court concluded that evidence of the defendant's prior acquittal was admissible and reasoned:

> Faced with the fact that the jury had before it evidence that he had previously committed perverted sex acts, it was essential to the applicant's defense that he attempt to dispel the impact of that evidence on the jury. This he could do by showing that he had been tried and acquitted of those offenses. His acquittal was relevant and material and he was entitled to establish it by proper evidence. It was not only error to exclude such evidence, but the error was material to his right to a fair trial.

Contrary to our earlier precedent, *United States v. Janis, supra,* we now have held that evidence of uncharged misconduct may be admissible under Mil.R.Evid. 404(b), even though it has been established only by evidence which was less than "clear and convincing." *United States v. Mirandes-Gonzalez, supra* at 413. In view of our relaxation of the threshold requirements applicable to prosecution use of such evidence, we think it is only fair that an accused be allowed to bring to the factfinders' attention the fact that he was acquitted when brought to trial for the other misconduct. Allowing the defense to introduce evidence of the acquittal should be a condition imposed by the military judge in the proper exercise of his discretion before allowing evidence of other offenses to be introduced pursuant to Mil.R.Evid. 404(b). We do not believe that it places an undue burden on the Government for the accused to be allowed to inform the factfinder that he was acquitted of misconduct as to which evidence is being offered in a subsequent trial.[5]

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[5] However, the defense must establish that the acquittal was for the *same* misconduct as to which the Government is offering evidence in the later trial.

V

Although the military judge erred in granting trial counsel's motion *in limine,* we conclude that this error was not prejudicial. Only two of the four girls testified to prior sex acts as to which Cuellar had been acquitted; and as to the remaining two incidents, Cuellar had never been acquitted in any court. In our view, these remaining incidents, along with the testimony of Jenny, her father, and Harper, provided overwhelming evidence against the accused and rendered inconsequential the judge's error. *Cf.* Art. 59(a), Uniform Code of Military Justice, 10 U.S.C. § 859(a).

VI

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

No. 55,405
NMCM 85 1337

UNITED STATES, APPELLEE

v.

CRISTOBAL G. CUELLAR, INTELLIGENCE SPECIALIST SECOND CLASS, U.S. NAVY, APPELLANT

September 28, 1988

Counsel

For Appellant: *Lieutenant Teresa A. McPalmer,* JAGC, USNR (argued); *Lieutenant Commander James J. Quigley,* JAGC, USN (on brief); *Commander Frederick N. Ottie,* JAGC, USN.

For Appellee: *Major Laura L. Scudder,* USMC (argued); *Captain Wendell A. Kjos, JAGC,* USN (on brief); *Captain Carl H. Horst,* JAGC, USN, *Commander Michael P. Green,* JAGC, USN, *Lieutenant W. A. Durling,* JAGC, USNR.

Military Judge: PHILIP F. ROBERTS

Opinion of the Court

EVERETT, Chief Judge:

Cuellar was tried by a general court-martial with members and found guilty of committing an indecent act upon a female under 16 years of age, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. He was sentenced to a dishonorable discharge, confinement for 6 years, and reduction to E-1. The convening authority approved the sentence, and the Court of Military Review affirmed. 22 M.J. 529 (1986). This Court granted review to consider these interrelated evidentiary issues:

I

WHETHER THE TRIAL COURT ERRED IN ALLOWING FOUR FEMALE WITNESSES TO TESTIFY THAT APPELLANT HAD COMMITTED PRIOR UNCHARGED ACTS OF SEXUAL MOLESTATION UPON THEM.

II

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE OF PRIOR UNCHARGED ACTS OF SEXUAL MOLESTATION FOR WHICH ACTS APPELLANT HAD PREVIOUSLY BEEN TRIED AND ACQUITTED IN STATE COURTS.

III

WHETHER AFTER ADMITTING EVIDENCE OF PRIOR UNCHARGED ACTS OF SEXUAL MOLESTATION, THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO INTRODUCE EVIDENCE THAT HE HAD BEEN TRIED IN STATE COURTS AND ACQUITTED OF CHARGES ARISING FROM TWO OF THESE ACTS.

I

A

On Thanksgiving Day, 1983, Cuellar hosted a large family gathering at his quarters at Fort Ord, California. His sister-in-law, her husband, and their four children, including their 10-year-old daughter Jenny, were present. The guests stayed overnight, and Jenny slept in a bedroom upstairs with Cuellar's little son and daughter. After falling asleep fully dressed, she awoke and found appellant rubbing her stomach. He had pulled her shirt up to the middle of her chest and had unbuttoned and unzipped her pants. Jenny recognized Cuellar because he was the only bald-headed person at the house that night. When she pushed his hand away and attempted to get out of the bed, he told her to lie back down and he would leave her alone. However, after she did so, he lifted her panties away from her body and put his hand near her vagina. He stopped when she hit his arm. On the pretext that she had to use the bathroom, Jenny went to the bathroom and then quickly proceeded to where her parents were sleeping and woke her father.

According to her father, Jenny was nervous and "shaking and I couldn't understand her. She was crying, and I tried to get her to calm down because I couldn't understand her at the moment." He immediately confronted Cuellar, who was standing in the living room, "looking at me real nervous, trying to have me stay quiet." However, Cuellar did not seem surprised by the confrontation and appeared to have been waiting for him to say something about the indicent.[1] The father then asked Cuellar why "he molest[ed]" Jenny,

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[1] Jenny's father testified that at this time Cuellar was wearing cut-off shorts but that earlier that day he had worn black pants. Jenny

> and I was yelling and he stood staring at me and putting his fingers towards his mouth and trying to keep me to stay quiet. I just told him, "To hell with it!" Excuse my language. And I tried to get him to tell me why, and he turned around trying to get me to stay quiet, and he just laid on the couch pretending he didn't want to have nothing to do with it. So, I told him, "From this day on, I don't ever want to see you. I don't know you. I'm getting out of here right now. Don't ever say you are related to me."

Jenny's father and his family packed their things, abruptly left Cuellar's home around 4:00 a.m., and started driving back to their home in Oceanside.

Cuellar's illicit involvement with Jenny was further confirmed by a third prosecution witness, his brother-in-law, Donald Harper. He testified that he had been drinking with appellant and had asked what had happened at his house on Thanksgiving Day. Harper told Cuellar he had heard that Jenny's parents "were going to press charges for child molestation." Thereupon, appellant exclaimed, "I guess I really screwed up this time." Cuellar asked Harper to talk to Jenny's parents about "drop[ping] the charges if he agreed to seek psychiatric help."

B

Still, trial counsel wished to call to the stand four other young females – Sheryl, Robin, Darlene, and Becky – who allegedly had been sexually molested by Cuellar in his home at different times from 1980 to 1982. Darlene was Jenny's sister.

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had testified that a pair of black pants was by the side of the bed where she had been sleeping and that she had noticed the black pants when she went back into the bedroom to get her shoes and socks after the incident occurred.

Defense counsel promptly moved *in limine* to prevent them from testifying on the ground that their testimony was inadmissible under Mil.R.Evid. 404(b) and 403, Manual for Courts-Martial, United States, 1984. Furthermore, he contended that, even if the evidence of the prior molestations was generally admissible, the incidents involving Becky and Darlene should be excluded because in 1982 Cuellar had been acquitted in Virginia of criminal charges against him relating to molestation of Becky and in 1984 a California court had granted him a judgment of acquittal by reason of insufficient evidence to prove a charge that Darlene had been molested. Alternatively, the defense contended that, if evidence of these two incidents was received, then, at least, the defense should be allowed to inform the court-members that appellant had been acquitted on each occasion.

Trial counsel argued "that this is a textbook 404(b) case" and asserted that the previous misconduct would prove the intent and identity of appellant and would further corroborate Jenny's testimony. Any danger of unfair prejudice to appellant would be substantially outweighed by "the immeasurable probative value of this evidence." Furthermore, the prosecutor contended that an acquittal did not render inadmissible evidence concerning the alleged misconduct; and he himself later moved *in limine* that the defense "be precluded from using any testimony, remarks, questions or arguments which might inform the court members of said acquittals."

Upon considering the briefs and arguments of counsel, the military judge denied the defense motion *in limine*. He ruled the evidence was admissible under Mil.R.Evid. 404(b) for several reasons: There was a "striking similarity" in the previous acts of molestation that "most strongly" reflected "on the intent of the accused." He concluded that "the evidence might be utilized to destroy any

suggestion that the acts complained of were innocent or there was a mistake about the intention or mistake about what took place." Moreover, the previous acts might have constituted "signature-type acts"—conduct which bore the accused's unique imprint. Finally, he felt that the previous incidents involving the young females were admissible under Mil.R.Evid. 404(b) because they tended to establish Jenny's "credibility" and "would tend to offset any suggestion that" her testimony was "youthful fantasy or conjecture or unreasonable apprehension and fear."

The military judge ruled that the evidence had great probative value; that it related to certain elements of the offense; and that the Government's use of the evidence in this case was not unfairly prejudicial to appellant. As to the incidents involving Becky and Darlene, the judge perceived no double jeopardy or collateral estoppel, because "there was not sufficient findings concerning that testimony; and in that case, the parties—there is not a sufficient identity of parties."

The military judge also granted trial counsel's motion *in limine* to prevent the defense from introducing evidence showing that Cuellar had been acquitted of the charges against him in two of the molestation cases. He ruled that any acquittals were not relevant; but he indicated that Jenny could be questioned about her sister Darlene's case in order to show bias.

Sheryl then testified that 4 years before, when she was 10, she had spent New Year's Eve at Cuellar's house. While sleeping in the same bed with his daughters, she awoke to find him with his hand under the covers—under her nightgown—and touching her private parts. She pushed him away and left his house. According to Robin, several years earlier, when she was 15, she awoke while spending the night at Cuellar's house and found him lying beside her rubbing her "butt" with one hand and her

vagina with the other. She left the bed but did not leave his house.

Darlene testified that 4 years before, when she was 8, she had stayed several days at Cuellar's home; and one night she awoke to find her jeans and shirt unbuttoned. He was feeling her stomach and placing his finger inside her vagina. She turned away and whispered to his daughter, Marie Cuellar, with whom she shared the bed. Thereupon, appellant left the room.

Finally, Becky testified that 3 years before, when she was 10, she had spent New Year's Day at Cuellar's house. On that morning she and Christy Cuellar, his other daughter, with whom she was sleeping, were awakened by appellant and offered breakfast. While they were in the kitchen, Cuellar, on the pretext of checking her for mosquito bites, rubbed his hands all over her body—including under her nightgown and between her legs. Christy had been sent to fetch some ointment while this was occurring; and, upon her return, Cuellar sent her back upstairs for a different ointment and again rubbed Becky's body and private parts. Shortly thereafter, while Christy was watching television, Cuellar tried to place Becky's hand inside his pants; but she jerked her hand away, ran upstairs, and reported the incident to her mother and her mother's boyfriend.

II

The first issue to be decided is whether the testimony of any of these young girls was admissible under Mil.R.Evid. 404(b). The Rule provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such

as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We conclude that this evidence qualified for admission under Mil.R.Evid. 404(b). Trial counsel properly attempted to use the previous misconduct to prove Cuellar's intent and to corroborate Jenny's testimony about his identity. Moreover, we agree with the military judge that there were close parallels between the previous acts of molestation committed by Cuellar and the claimed misconduct with Jenny. Each of the sex acts was committed (1) against young girls under the age of 16; (2) while they were visiting Cuellar's home, either by themselves or with other family members; (3) with one exception, during the nighttime; (4) while the minor female was in the presence of one or more children who were either sleeping or unaware of the activity going on; and (5) in each instance Cuellar placed his hand near the private area of the girl's body. Not only does this testimony of the four young witnesses strongly suggest that he intended to molest Jenny sexually, but also it tends to demonstrate a *modus operandi* on Cuellar's part. Under these circumstances, the evidence was admissible under Mil.R.Evid. 404(b). *See United States v. Mann,* 26 M.J. 1 (C.M.A. 1988).

Appellate defense counsel also have claimed that the evidence of uncharged misconduct was not "clear and conclusive" and therefore should have been excluded. *See United States v. Janis,* 1 M.J. 395, 397 (C.M.A. 1976). Even if this high standard of proof were applicable, the testimony of the four girls would have met that standard. Moreover, as we interpret Mil.R.Evid. 404(b), it does not require that the evidence of uncharged misconduct be "clear and conclusive," so in this regard *Janis* is superceded. *United States v. Mirandes-Gonzalez,* 26 M.J. 411

(C.M.A. 1988); *cf. Huddleston v. United States,* 485 U.S. __, 108 S.Ct. 1496, 99 L.Ed.2d 771, 781 (1988) (interpreting the comparable Federal Rule of Evidence). Under both the Military Rules and the Federal Rules, the judge is not required to make a preliminary finding that the uncharged misconduct occurred. Instead, he "decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." 108 S.Ct. at 1501.

We also disagree with appellant's argument that the probative value of the previous sex offenses was substantially outweighed by its danger of unfair prejudice to appellant. The decision to admit or reject evidence pursuant to Mil.R.Evid. 403 lies within the military judge's discretion; and unless he has abused his discretion, we will not disturb his ruling. In this case, there was no abuse of discretion in admitting the challenged evidence. *Cf. United States v. Hicks,* 24 M.J. 3 (C.M.A.), *cert. denied,* 108 S.Ct. 95 (1987) (the military judge did not abuse his discretion in admitting the testimony of four females who all testified to appellant's previous, similar acts of extortion for sexual favors).

III

In *United States v. Hicks, supra,* we also considered whether the military judge had erred in admitting evidence of prior acts of sexual molestation of which appellant had previously been tried and acquitted in state courts. In resolving the issue against that accused, we observed that a split of authority existed on the issue; but we concluded that

> the better view [which is the majority rule] is that collateral estoppel does not preclude use of otherwise admissible evidence even though it was previously introduced on charges of which an accused has been ac-

> quitted. The questions to be decided are whether the evidence is relevant (Mil.R.Evid. 401) and whether the probative value of the proffered evidence is outweighed by its prejudicial effect (Mil.R.Evid. 403).

24 M.J. at 8 (citations omitted).

We reaffirm the holding in *Hicks*.

IV

The military judge granted trial counsel's motion *in limine* to prevent the defense from introducing evidence or from arguing that Cuellar had been acquitted in state courts of the sexual misconduct about which Becky and Darlene were testifying. In so ruling, the judge was in error.

Just as authority is divided as to whether the prosecution may offer evidence of uncharged misconduct of which the accused has been previously acquitted, there also is no unanimity of view whether, if evidence of the misconduct is admitted, the defendant may also show that he has been found not guilty thereof.

Appellant has cited 29 Am Jr 2d, Evidence § 332, at 380, which states:

> Most courts following that rule [that evidence of misconduct is admissible notwithstanding a prior acquittal] hold that where proof of another offense has been admitted, the defendant is entitled to prove his acquittal, although there is, in this respect, authority to the contrary.

(Footnotes omitted.)

This source refers to an Annotation in 86 A.L.R. 2d 1132 (1962), which states, in § 4, that "[t]he authorities are not in agreement" on this issue but does not purport to state a majority rule. The Later Case Service Supplement

(at 416) to this section cites various state court cases which generally hold that it is error to exclude evidence of the acquittal.[2]

The Government—although apparently conceding that the majority rule of the state courts is to allow a defendant to prove that he has been acquitted of other misconduct—contends that the approach of the federal cases is somewhat different; and they cite *United States v. Riley*, 684 F.2d 542 (8th Cir. 1982), *cert. denied*, 459 U.S. 1111, 103 S.Ct. 742, 74 L.Ed.2d 962 (1983); *United States v. Kerley*, 643 F.2d 299, 300-01 (5th Cir. 1981); and *United States v. Viserto*, 596 F.2d 531, 536-37 (2d Cir.), *cert. denied*, 444 U.S. 841, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979).

The Government reasons that "evidence of a prior acquittal is not relevant because it does not prove innocence, but rather merely indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime"; and the "probative value" of such evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *See United States v. Kerley, supra.* Moreover, "a judgment of acquittal is hearsay"; and, unlike a judgment of conviction, it is not excepted by the rules of evidence from the operation of the hearsay rule. *United States Viserto, supra* at 537.

Although we recognize that the Government's argument is strong, we conclude that an accused is entitled to prove that he has been acquitted of acts of misconduct received in evidence under Mil. R.Evid. 404(b). As the Supreme Court of Oregon has pointed out:

> [T]he admission of evidence of other offenses in which the defendant has been involved without dis-

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[2] This supplement also mentions that the annotation in 86 A.L.R. 2d 1132 (1962) has been superseded by an annotation in 25 A.L.R. 4th 934 (1983).

> closing that he was acquitted tends to brand him as a 'criminal' and exposes him to the danger that the jury might lose sight of the presumption of innocence and the high level of proof required to rebut it. Contrary to the state's contention in this case, we do not believe that there is a risk of confusion of the jury sufficient to require the defendant to stand mute on the fact of her innocence or guilt of a crime nearly identical to the one charged.

State v. Smith, 532 P.2d 9, 11-12 (1975).

In *Womble v. State*, 258 A.2d 786, 789 (Md. App. 1969), which, like this case, involved a sexual offense, the Court concluded that evidence of the defendant's prior acquittal was admissible and reasoned:

> Faced with the fact that the jury had before it evidence that he had previously committed perverted sex acts, it was essential to the applicant's defense that he attempt to dispel the impact of that evidence on the jury. This he could do by showing that he had been tried and acquitted of those offenses. His acquittal was relevant and material and he was entitled to establish it by proper evidence. It was not only error to exclude such evidence, but the error was material to his right to a fair trial.

We have recently ruled that—contrary to an earlier precedent, *United States v. Janis, supra*—evidence of uncharged misconduct may be admissible under Mil.R.Evid. 404(b), even though it has been established only by evidence which was less than "clear and convincing." *United States v. Mirandes-Gonzalez, supra* at 413. In view of the relaxation of requirements applicable to prosecution use of such evidence, we think it is only fair that an accused be allowed to bring to the factfinders' attention that he was acquitted when brought to trial for the other

misconduct. Allowing the defense to introduce evidence of the acquittal should be a condition imposed by the military judge in the proper exercise of his discretion before allowing the evidence of other offenses to be introduced pursuant to Mil.R.Evid. 404(b).

If a previous court-martial or federal district court had acquitted Cuellar of the other misconduct, the Government would be barred by collateral estoppel from introducing evidence of that misconduct because the sovereign was the same in both cases. *Cf. Ashe v. Swenson*, 397 U.S. 436 (1970). When the acquittal has taken place in a state court, it is no undue burden on the Government for the accused to be allowed to inform the factfinder that he was acquitted there.

V

Although the military judge erred in granting trial counsel's motion *in limine*, we conclude that this error was not prejudicial. Only two of the four girls testified to prior sex acts as to which Cuellar had been acquitted; and as to the remaining two incidents, Cuellar had never been acquitted in any court. In our view, these remaining incidents, along with the testimony of Jenny, her father, and Harper, provided overwhelming evidence against the accused and rendered inconsequential the judge's error.

VI

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

APPENDIX C

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCCM 85 1337

UNITED STATES

v.

CRISTOBAL G. CUELLAR, 585 05 9880, INTELLIGENCE SPECIALIST SECOND CLASS (E-5), U.S. NAVY

Decided 20 March 1986

Before: LEO J. COUGHLIN, A. F. MIELCZARSKI, N. P. DECARLO

Sentence adjudged 8 January 1985 of General Court-Martial convened by Commanding Officer, Naval Station, Treasure Island, San Francisco, California 94130

LCDR HAROLD M. SHAW, JAGC, USN, Appellate Defense Counsel
LCDR FREDERICK N. OTTIE, JAGC, USN, Appellate Defense Counsel
LCDR JAMES J. QUIGLEY, JAGC, USN, Appellate Defense Counsel
MICHAEL F. FASANARO, JR., Civilian Defense Counsel
LCDR JEFFREY S. SAWTELLE, JAGC, USN, Appellate Government Counsel

DECARLO, Judge:

Contrary to his pleas, appellant was convicted in January 1985 by a general court-martial, composed of members, of one specification alleging commission of an indecent act upon a female under 16 years of age, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. He was sentenced to confinement at hard labor for six years, reduction to pay grade E-1, and a dishonorable discharge.

On Thanksgiving day 1983, appellant hosted a large family gathering at his quarters at Ford Ord, California. Among those in attendance were appellant's sister-in-law Janet H, her husband, and their four children, including 10 year old Jenny H. After finishing dinner and helping clean the kitchen, Jenny went to bed in an upstairs bedroom with appellant's son and daughter. The three children slept in the same bed, Jenny being on one of the ends. Shortly after falling asleep, Jenny who was wearing pants and a t-shirt, was awakened by the appellant who had pulled up her shirt to the middle of her chest, unbuttoned her pants, and was rubbing her lower stomach. Jenny moved appellant's hand away and attempted to get out of bed, whereupon appellant stated, "Just lay down and I'll leave you alone." After Jenny laid back down, the appellant continued his assault by lifting the girl's underpants away from her body and inserting his hand therein to a point approximately one inch above the girl's vagina. Jenny immediately punched the appellant, who ceased his assault. Appellant then warned her that if she told anybody what happened, she would be in big trouble. Jenny, feigning that she had to go the bathroom, then left the bed and ran to her parents' room, telling them what had happened. Appellant was subsequently charged with committing an indecent act upon a female under the age of sixteen by fondling her lower stomach and private parts.

At trial, the major part of the Government's case consisted of the testimonies of the victim and four other young girls, Sheryl R, Robin Lee H, Rebecca K, and Darlene H (the victim's sister), who claimed to have been sexually molested by the appellant at different times during the period from 1980-82 under similar circumstances. In a motion *in limine*, appellant moved that the evidence of the four prior uncharged acts of misconduct be excluded on the grounds that such evidence was not admissible pursuant to Military Rule of Evidence (Mil. R. Evid.) 404(b), and that its probative value was substantially outweighed by its prejudicial effect. Mil. R. Evid. 403. Additionally, appellant argued that even if the court ruled that the testimonies concerning the prior molestations were generally admissible, evidence of at least two of the alleged incidents should be excluded because the misconduct had been previously prosecuted and had resulted in acquittals. The appellant urged alternatively that if evidence of these latter two extrinsic acts were admitted, then the defense should be allowed to introduce evidence of the fact that their prosecutions had resulted in acquittals. The Government argued that the evidence of the extrinsic acts were admissible under 404(b) and 403 to prove the intent and identity of the appellant, and that the acquittals did not render them inadmissible. Additionally, in a motion *in limine* of its own, the Government requested that the military judge rule that the defense "be precluded from using any testimony, remarks, questions or arguments which might inform the court-members of said acquittals." Upon considering the briefs and arguments of counsel, the military judge denied the defense motion and granted the Government's motion, thus allowing the Government to use the testimony concerning the prior molestations and prohibiting the appellant from introducing evidence that two of those incidents had resulted in ac-

quittals. Appellant was subsequently convicted of the offense as charged.

Before this Court appellant makes the following assignments of error:

I

THE TRIAL COURT ERRED IN ALLOWING SHERYL R, ROBIN LEE H, DARLENE H, AND REBECCA K TO TESTIFY THAT APPELLANT HAD COMMITTED PRIOR UNCHARGED ACTS OF SEXUAL MOLESTATION UPON THEM.

II

EVEN IF THE MILITARY JUDGE WAS CORRECT IN ADMITTING EVIDENCE OF PRIOR UNCHARGED ACTS OF APPELLANT, HE ERRED IN ADMITTING ACTS FOR WHICH THE APPELLANT PREVIOUSLY HAD BEEN TRIED AND ACQUITTED.

III

THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO INTRODUCE EVIDENCE THAT HE HAD BEEN ACQUITTED OF CHARGES ARISING FROM ALLEGED PRIOR ACTS OF SEXUAL MISCONDUCT AGAINST DARLENE H AND REBECCA K.

IV

A SENTENCE WHICH INCLUDES CONFINEMENT AT HARD LABOR FOR 6 YEARS AND A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE.

V

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY OF THE WORDS "PLACING HIS HANDS UPON HER . . . PRIVATE PARTS."

We discuss the assignments *seriatim*.

DISCUSSION

I

ADMISSIBILITY OF PRIOR UNCHARGED INDECENT ACTS

Mil. R. Evid. 404(b) provides that

> [e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The admissibility of evidence of uncharged misconduct under Mil. R. Evid. 404(b) is governed by a two part analysis enunciated by the Court of Military Appeals in *United States v. Brannan*, 18 M.J. 181 (C.M.A. 1984). The first part looks at the evidence admitted to show that the accused actually committed the extrinsic offense, and the second examines the particular purpose for which the evidence is offered. *Id.* at 182-83.

Appellant's first assignment of error concerns the initial step of this analysis, and is based on the requirement set forth in *United States v. Janis*, 1 M.J. 395 (C.M.A. 1976), that evidence of extrinsic offenses be "plain, clear and conclusive" in order for the offenses to be admissible. *Id.* at 397. Appellant fails to recognize, however, that the precodal standards set forth by the Court in *Janis* are no

longer applicable. *United States v. Peterson*, 20 M.J. 806, 813 (NMCMR 1985); *see also United States v. Brannan*, 18 M.J. 181 (C.M.A. 1984) and *United States v. Woodyard*, 16 M.J. 715 (AFCMR 1983). In *Peterson*, a panel of this Court determined that

> [t]here is no rigid limitation with respect to the quantum of proof required for admissibility of an extrinsic offense. The evidence must be sufficient, however, to permit the members to conclude that the accused in fact committed the extrinsic offense. If the members could not be reasonably so conclude, the proof would be insufficient and inadmissible.

Peterson, 20 M.J. at 813. *See also United States v. Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) and *Woodyard*, 16 M.J. at 720.

In this case, the only evidence of the extrinsic offenses alleged by the Government was the testimony of the victims themselves. We find that, based on such testimony, the members could reasonably conclude that appellant committed the acts alleged. *Peterson, supra. See also United States v. Thomas*, 11 M.J. 388, 393-394 (C.M.A. 1981). We further note that the direct testimony of a victim of an alleged extrinsic offense has been held to be sufficient to satisfy even the stricter clear and convincing standard of *Janis. United States v. Williams*, 17 M.J. 548 (ACMR 1983). Thus, we find that the testimonies of the victims of the extrinsic offenses were sufficient to render evidence of the prior acts admissible pursuant to Mil. R. Evid. 404(b).

We note as well that the extrinsic evidence was properly admitted under the second step of the *Brannan* analysis. The admissibility of the extrinsic offenses under this step is a function of the similarity of the extrinsic offense to the charged offense, the degree of which varies according to

the purpose for which it is offered. *Peterson*, 20 M.J. at 811; *Beechum*, 582 F.2d at 911. The appellant in this case was charged with committing an indecent act upon the body of a female under 16 years of age with the specific intent to satisfy his sexual desires. Trial defense counsel repeatedly questioned the ability of the victim to positively identify her attacker; thus the extrinsic evidence was relevant both to prove the specific element of intent and to show the identity of the assailant. The testimonies of the victims established that, similar to the charged offense, each of the extrinsic offenses was perpetrated: (1) against a female child under the age of sixteen; (2) *while the child was visiting at the appellant's home*, either by herself or with other family members; (3) with one exception, during the nighttime; (4) with one exception, while the victim was in the presence of one or more other children who were either sleeping or unaware of what was going on; (5) by the placing of the assailant's hands onto the private areas of the victim. We find that the facts of both the extrinsic offenses and the charged offense are sufficiently similar in characteristics to be properly admissible to prove both the intent and the identity of the appellant. *See generally Peterson*, 20 M.J. at 811-812.

We reject as well appellant's contention that the military judge abused his discretion when he found that the probative value of the evidence was not substantial outweighed by its prejudicial effect under Mil. R. Evid. 403. It is well-established that the balancing of factors under Rule 403 "is within the sound and broad discretion of the military judge." *Peterson*, 20 M.J. at 813. The military judge specifically found that the "relative probative value" of the evidence was "highly significant" and "very strong." (R. 19). He conducted a well-reasoned analysis of the factors to be weighed in the Rule 403 balancing test. We find that he did not abuse his discretion in determining that the

probative value of the extrinsic offenses was not substantially outweighed by their prejudicial effect.

II

RULE 404(b) AND PRIOR ACQUITTALS

Before this Court, appellant maintains his position that the testimonies of Rebecca K and Darlene H should have been excluded because they were each the subject of separate criminal proceedings that resulted in acquittals. In 1982, a Virginia jury acquitted appellant of charges arising from the alleged incident with Rebecca K. On 24 July 1984, a California court granted a defense motion for judgment of acquittal for insufficient evidence in criminal proceeding resulting from the alleged incident with Darlene H. While conceding that the majority view allows evidence of extrinsic acts notwithstanding the fact that they resulted in acquittals, appellant urges that the minority view is the better and fairer one. He maintains that "broad fundamental notions of fairness" make it an unjust burden to force a defendant to relitigate an issue which a jury has decided in his favor and, citing *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979), argues that the military judge should have prevented the Government from bringing in evidence of the incident underlying the prior acquittal. The Government urges this Court to adopt the majority view.

First, we find, as conceded by the appellant, that the doctrine of collateral estoppel is not applicable to the instant case because different sovereigns prosecuted him. *Ashe* v. *Swenson*, 397 U.S. 436, 443, 25 L.Ed.2d 469, 475, 90 S.Ct. 1189 (1970).[1] *See generally* 21 Am.Jur.2d., Criminal Law, § 331.

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[1] " 'Collateral estoppel' . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment,

Second, we disagree with the appellant's argument that it is fundamentally unfair for the Government to introduce evidence of extrinsic acts of misconduct where the earlier prosecution of those acts resulted in acquittals. An act need not result in criminal liability to be admissible under Rule 404(b). *United States v. Roe*, 670 F.2d 956 (11th Cir. 1982). The fact of a prior acquittal of an extrinsic offense does not in any way insulate the underlying facts from admissibility under the rule.[2] *United States v. Wyatt*, 762 F.2d 908 (11th Cir. 1985); *United States v. Van Cleave*, 599 F.2d 954 (10th Cir. 1979); *Smith v. Wainwright*, 568 F.2d 362 (5th Cir. 1978). This rule of law was recognized long before the advent of the Federal Rules of Evidence. In *Lee v. State*, 69 S.E. 310 (Ga. App. 1910), the court reasoned that

> the relevancy of these other transactions does not arise from the fact that they were criminal, but from the fact of their having happened. The fact that the jury trying the case . . . decided that there was not evidence to show beyond a reasonable doubt that the defendant acted criminally . . . does not rob the facts attendant on that transaction of their inherent probative value. . . . [T]he fact of acquittal as to the other crimes does not exclude the right to prove them when the testimony is otherwise relevant. 'The acquittal merely exempts him [the accused] from punish-

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that issue cannot be litigated between the *same parties* in any future lawsuit." *Ashe v. Swenson*, 397 U.S. at 443, 25 L.Ed.2d at 475, 90 S.Ct. 1189. (Emphasis added).

[2] The rationale for this rule is that the prior acquittal may reflect technical defects in the case or the higher (beyond a reasonable doubt) standard of proof. *United States v. Wyatt*, 762 F.2d at 911, n.3, quoting 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 404(10) at p. 404-58 (1982 ed.).

> ment and from another prosecution. It does not necessarily show that he was innocent.'

69 S.E. at 312.

Rule 404(b) attaches to those extrinsic acts of which an accused was found not to be criminally liable as well as to those for which there is no potential for criminal liability (under State or Federal law). The fact that the extrinsic offense resulted in a conviction or acquittal is not a decisive factor, although it is to be weighed by the trial judge in deciding whether resulting prejudice outweighs probative value. *United States v. Burkhart,* 458 F.2d 201 (10th Cir. 1971); *see also United States v. Castro-Castro*, 464 F.2d 336 (9th Cir. 1972); *Hernandez v. United States*, 370 F.2d 171 (9th Cir. 1966). We find, therefore, that otherwise relevant and admissible evidence under Rule 404(b) is not rendered inadmissible because the accused was previously acquitted of that offense.

III

ADMISSIBILITY OF PRIOR ACQUITTALS

We turn now to the assignment asserting that the military judge erred when he refused to allow the appellant to introduce the fact of the two acquittals into evidence. Appellant maintains that it is "patently unfair to allow evidence of prior bad acts and not allow evidence of prior acquittals." The military judge found that the acquittals bore no relevant to either of the alleged prior acts of sexual misconduct. We agree.

> A judgment of acquittal is relevant to the legal question of whether the prosecution is barred by the constitutional doctrine of double jeopardy or of collateral estoppel. But once it is determined that these pleas in bar have been rejected, a judgment of ac-

> quittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted. Not only does the inference appellant suggests not flow from the judgment of acquittal . . ., but also a judgment of acquittal is hearsay. The Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, Rule 803(22), not judgments of acquittal.

United States v. Sutton, 732 F.2d 1483, 1493 (10th Cir. 1984) (quoting *United States v. Viscerto*, 596 F.2d 531, 537 (2d Cir.), *cert. denied*, 444 U.S. 841, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979)). *See also United States v. Riley*, 684 F.2d 542 (8th Cir. 1982); *United States v. Kerley*, 643 F.2d 299, 300-301 (5th Cir.1981). *See also* Mil. R. Evid. 803(22). Assuming *arguendo*, that some quantum of relevance could be attributed to the acquittals under Mil. R. Evid. 401, the acquittals would have been properly excluded in the instant case because their probative value was substantially outweighed by the danger of confusion of the issues and the potential for misleading the members. Mil. R. Evid. 403; *Kerley*, 643 F.2d at 301. We therefore find that the military judge did not abuse his discretion in excluding evidence of the acquittals for lack of relevancy.

IV

SENTENCE APPROPRIATENESS

Appellant's conviction is based upon one incident of committing an indecent act upon the body of a ten year old girl by placing his hands upon her lower stomach and private parts. The maximum punishment for this offense is a dishonorable discharge, confinement at hard labor for seven years, total forfeiture of all pay and allowances, and reduction to pay grade E-1. Appellant was sentenced to a dishonorable discharge, confinement at hard labor for six

years, and reduction to E-1. He maintained now that his punishment is overly severe. Appellant gratified his sexual desires through the use of force, deceit, and intimidation of a ten year old guest in his house. We find that, given the nature of this crime and the tender age of the victim involved, appellant's sentence is appropriate. This assignment of error is rejected.

V

SUFFICIENCY OF THE EVIDENCE

Appellant claims that the evidence was insufficient to sustain a finding of guilty to that part of the specification alleging that the appellant had committed an indecent act by placing his hands on the victim's "private parts." Appellant's assignment is based on the fact that he never touched the victim's vagina or breasts. The evidence did reveal, however, that appellant's hand came to within one inch of the victim's vagina when he touched her. The term "private parts" has been judicially defined to include the immediate vicinity of the genitals as well as the genitals themselves. *State v. Blount*, 60 N.J. 23, 286 A.2d 36 (1972); *State v. Nash*, 83 N.H. 536, 145 A. 262 (1929). We consider that an area in such close proximity to the genitals is no less of a "private part" than the genitals themselves. Thus, we reject appellant's final assignment of error.

Accordingly, the finding of guilty and the sentence as approved on review below are affirmed.

/s/ N. P. Decarlo
N. P. DECARLO

Senator Judge COUGHLIN and Judge MIELCZARSKI concur.

/s/ Leo J. Coughlin
LEO J. COUGHLIN

/s/ A. F. Mielczarski
A. F. MIELCZARSKI

U.S. GOVERNMENT PRINTING OFFICE: 1989—236 072/62062